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Sustainable development and EU trade agreements. What kind of future awaits the European environmental policy?

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Abstract: The present paper aims to materialize on an analysis the sustainable development through the EU trade agreements negotiated for its own promotion as well as through the obligations established in them from the dispute resolution mechanisms. The more precise enforcement mechanisms and trade sanctions in environmental obligations will be examined within the TSD Chapters, as foreseen obligations where the resolution mechanisms target the critical issues of an approach adopted by the Union itself. The developments are continuous as well as the many and interesting profiles provided in practice as we see in the agreements of the EU with New Zealand and the United Kingdom.

Keywords: sustainable development; EU law; trade agreements; European trade policies; TSD Chapters; dispute settlement;

Generalized Scheme of Preferences (GSP); European Green Deal; enforcement; European environment policy.

Introduction

EU environmental policy includes a notion that comes from international law, namely the sustainable development (Kenig-Witkowska, 2017)¹. This has been seen as one of the main priorities of the EU in the sector. The purpose and activity of the Union are included in the deepening of environmental protection within the ambit not only of environmental policy but also in the external relations of the EU (Morgera, 2012). So sustainable development has a wide circle that includes the common commercial policy as well as the Free Trade Agreements (FTA) (Duina, 2023).

The Trade and sustainable development Chapters (TSD Chapters) are identified between the reciprocal obligations regarding environmental protection and the protection of workers' rights, i.e. as dimensions oriented towards sustainable development (Žvelc, 2012; Bartels, 2013; Bartels, 2015; Velluti, 2020). The obligatory mechanisms have the objective of complying with the pre-established obligations and the

¹See, World Commission on Environment and Development (WCED), Our Common Future, UN General Assembly, Doc. A/42/427, Sect.4: “(...) ground for identifying its four key elements: 1) the necessity of taking into account the needs of present and future generations; 2) the acceptance of limitations in satisfying, among others, the exploitation of natural resources; 3) recognition of inter-generation justice in the division of rights and duties; and 4) integrated approach to issues of environment and development (...)”.

sanctioning procedures in the event of violation of the established rules. This is a practice that has been established for years and first of with the agreement that was signed in 2010 with South Korea² after a continuous debate followed with the European institutions (Hradilova, Svoboda, 2018; Bronckers, Gruni, 2021).

Within this context already the European Commission (EC) with the communication entitled: “An open, sustainable and assertive trade policy”, which was adopted in February 2021³ underlined and affirmed:

“(...) the need to improve the effective implementation and application of chapters on sustainable development in trade agreements”⁴ as well as the possibility of introducing sanctions in case of non-compliance⁵. This position has also been noted by the European Parliament (EP). This has worked many times for its own

²See in particular: Free Trade Agreement between the European Union and the Republic of Korea (OJ EU of 14.05.2011, L 127). See also art. 44, par. 1, of the Association Agreement between the European Community and the Republic of Chile (OJ EU of 12.30.2002, L 352), signed on 30 December 2002, dedicated to cooperation between the parties in the social sector, as well as, and above all, the Agreement of economic partnership between the European Community and the states of the Caribbean Forum (CARIFORUM), signed on 15 October 2008 (OJ EU of 30.10.2008, L 289/I/3).

³Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Trade Policy Review-An open, sustainable and assertive trade policy, COM(2021) 66, 18 February 2021. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:66:FIN>

⁴Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Trade Policy Review-An open, sustainable and assertive trade policy, op. cit., par. 15.

⁵Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Trade Policy Review-An open, sustainable and assertive trade policy, op. cit., par. 14.

strengthening but also for the implementation of the TSD Chapters⁶. What do we understand from these commitments?

The EU certainly shows its continued commitment to the implementation process of the European Green Deal⁷ given the related program launched by the EC to achieve climate neutrality⁸ and also to favor ecology that passes to a transitional level (Van Zeben, 2020; Campins Eritja, 2020; Beverelli, Kurtz, Raess, 2020; Jordan, Gravey, 2021; Chiti, 2022) following the aims of trade policy and trying to offer a related platform to engage with trading partners on climate and environmental action⁹ and negotiate free trade agreements with important trading partners, such as Australia and Mercosur¹⁰. The strategy

⁶European Parliament resolution of 25 November 2010 on human rights, social and environmental standards in international trade agreements (2009/2219(INI)), par. 22(a); European Parliament resolution of 5 July 2016 on the implementation of the 2010 Parliament recommendations on social and environmental standards, human rights and corporate responsibility (2015/2038(INI)), parr. 21-22: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016IP0298>

⁷See also in argument: Communication from the Commission to the European Parliament, the Council, the European Central Bank, The European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, Annual Sustainable Growth Strategy 2020, COM/2019/650 final: “(...) “Safeguard the earth’s capacity to support life in all its diversity, respect the limits of the planet’s natural resources and ensure a high level of protection and improvement of the quality of the environment. Prevent and reduce environmental pollution and promote sustainable consumption and production to break the link between economic growth and environmental degradation (...)”.

⁸Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (“European Climate Law”), PE/27/2021/REV/1, OJ L 243, 9.7.2021, p. 1-17.

⁹Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640, 11 December 2019, p. 24: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN>

¹⁰<https://policy.trade.ec.europa.eu/news/meeting-european-union-mercotur->

adopted by the EU will thus condition the regulatory provisions on sustainable development included in future agreements (Chiti, 2022).

Trade and environmental policy side by side makes us think that by now the subject of sustainable development is important and has passed from the international context to the European one as a discipline that reserves and also develops free trade agreements. The legal framework of the common commercial policy is rich and broad and focuses more on the external action of the EU also including the issue of sustainable development that will be developed in the next paragraphs.

Promotion of sustainable development and EU trade policy

The external action of the EU immediately makes us think of Art. 21 TEU (Blanke, Mangiamelli, 2021) which defines the objectives and guidelines of the different material policies. Fundamental values characterize the existence of the EU according to Art. 2 TEU (Blanke, Mangiamelli, 2021) defining themselves as the main values for their own evolution and European integration. Their ultimate goals include the political, economic, sustainable development and welfare nature while retaining specific goals that are enshrined in treaties as any material policy that is implemented in the same shared goals.

[chief-negotiators-2023-03-08_en](#)

These objectives framed in the common commercial policy and according to EU legal system (Dimopoulos, 2010; Krajewski, 2012; Cremona, 2021) include the commercial policy that enters the external action of the Union according to the fifth part of the TFEU attributing to the Union pursuant to Art. 3, par. 1 TFEU (Gstöhl, 2010; Jurle, Lavenex, 2014; Blanke, Mangiamelli, 2021) a broad leadership to dispose when negotiating with weaker countries and above all in the financial sector (Meunier, Nicolaidis, 2023).

The exercise of trade policy is a tool where the Union promotes the values that are based on an orientation that is explicitly starting with the communication “Trade for all”¹¹, which represents one of the protagonists of the Union's work in this sector (Pelkmans, 2020). In fact, the EC affirms the idea of a trade and investment policy based on values, specifying that the achievement of economic growth should go hand in hand with social justice, respect for human rights, protection of health and safety and with strict labor and environmental standards¹².

¹¹Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions Trade, Growth and World Affairs Trade Policy as a core component of the EU's 2020 strategy Brussels, 9.11.2010 COM(2010) 612 final “(...) in order to encourage our partners to promote respect for human rights, labor standards, the environment and good governance, including in the tax area (...)” (p. 17): <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0612:FIN:EN:PDF>

¹²Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the

Thus, the commercial policy comes out of the pursuit of the objectives that the treaties are assigned. Art. 206 TFEU includes the harmonious development of world trade, the abolition of restrictions on international trade and the reduction of customs barriers as provided for by Art. 207 TFEU (Blanke, Mangiamelli, 2021), as well as the principles and general objectives of the external action of the Union, according to Art. 21 TEU (Gstöl, Hanf, 2014; Cremona, 2018; Yotova, 2018; Zandvliet, 2019)¹³.

A commercial policy that emerges from interests of an economic nature and from organic approaches that defend political values that seek to animate the spirit of the Union within a legal space (Borchert, Conconi, Di Ubaldo, Heghelegiu, 2021). According to Art. 3 TEU the objectives of the Union take into consideration the promotion of sustainable development (Van Hees, 2014; Jakab, 2016) as a provision and a principle which inspires the functioning of the internal market (par. 3, letter a) and the relations entertained of the Union with the world (par. 5).

External action based on Art. 21, par. 2, lit. f) TEU (Blanke, Mangiamelli, 2021) for sustainable development constitutes the

Regions: Trade for All Towards a more responsible trade and investment policy, COM/2015/0497 final, par. 18.

¹³CJEU, Opinion 2/15, Free Trade Agreement between the European Union and the Republic of Singapore of 16 May 2017, ECLI:EU:C:2017:376, parr. 139-147.

fundamental principles as an operational path of the Union at a global level. Thus the need of the Union to seek to guarantee social and environmental protection is configured as a transversal dimension where the purposes are inspired according to the EU in the definition and implementation of each policy or action by promoting sustainable development according to Articles 9 and 11 TFEU (Blanke, Mangiamelli, 2021).

Thus the action of the Union is revealed from an external profile and includes both the productive normative acts and the legal effects towards third parties. The international agreements were aiming at regulating the various legal situations on the basis of reciprocity.

The promotion of sustainable development represents a central element in the European legal order inspired by the action of the Union in a widespread way where the European institutions have shown in practice through various programmatic documents the prospects for the future and what is actually being sought for trade policy which has been defined by the president of the EC herself, Ursula von der Leyen, as:

“(...) a means to ensure prosperity here and to export our values throughout the world (...) to ensure that every future trade agreement concluded by the Union would contain a chapter dedicated to sustainable development, in order to comply with the strictest standards in terms of climate, environment and labor protection, with zero tolerance in terms of child labor (...)”¹⁴.

¹⁴Von Der Leyen, U. A more ambitious Union. My Agenda for Europe-Political orientations for the next European Commission 2019-2024, 2019, p. 19. https://commission.europa.eu/system/files/2020-04/political-guidelines-next-commission_en_0.pdf

Equally important the European Council where, through the strategic agenda for the period 2019-2024, included trade policy through its main objectives, i.e. declared the “promotion of Europe's interests and values in the world”, addressing the main global challenges, including the fight against climate change with a view to promoting sustainable development, through various instruments, including “an ambitious and solid trade policy”¹⁵.

Therefore, the European institutions focusing on the conference on the future of Europe¹⁶, as well as on the regulation of the conference on the future of Europe took into consideration and cited topics which included the role of the EU in the world specifying that the related issue would be addressed “on the basis of the strategic agenda of the European Council” and on the “political guidelines 2019-2024 of the European Commission”.

It appears evident that the consolidation of the Union's global vocation, accompanied by the ability to promote respect for fundamental values even outside its borders, represents a basic objective of the European institutions, reserving primary

¹⁵European Council, A new strategic agenda 2019-2024, of 20 June 2019, p. 6: <https://www.consilium.europa.eu/en/press/press-releases/2019/06/20/a-new-strategic-agenda-2019-2024/>

¹⁶Conference of the Future of Europe: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/conference-future-europe_en

attention to sustainable development, now considered an absolute priority¹⁷.

Goals as we understand in trade policy have to do with trying to export European standards of environmental protection and more labor rights through the Generalized Scheme of Preferences (GSP) (Kennedy, 2012) and to related TSD Chapters which include free trade agreements (Cooreman, Van Calster, 2020). One of the main differences between these tools has to do with the ownership of the obligations provided. The system of generalized preferences within an autonomous regime of the Union and in its own legal system is marked by a logic of a unilateral nature where international agreements have the objective of regulating the relative legal situations according to the principle of reciprocity and the obligations weigh in developing countries that are intended for commercial facilitation by respecting the agreed standards and ensuring all the contracting parties, including the Union as well.

The TSD Chapters which are included in the commercial agreements together with the GSP constitute the instrument rooted in the practice of the Union as well as the functioning of the TSD Chapters which concern the effectiveness of

¹⁷European Parliament resolution of 11 March 2021 on the European Semester for economic policy coordination: Annual Sustainable Growth Strategy 2021 (2021/2004(INI)), OJ C 474, 24.11.2021, p. 91-98: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2021.474.01.0091.01.ENG

enforcement mechanisms¹⁸.

Obligations regarding environmental protection and workers' rights. Between trade and sustainable development

Up to now we have mentioned Articles 207, par. 3, 218 TFEU and 6 TEU (Blanke, Mangiamelli, 2021) as basic articles for the negotiation procedures and the conclusion of trade agreements arriving at a much broader and more precise policy (Ott, 2016; Blanke, Mangiamelli, 2021)¹⁹ according to the exclusive competence of the Union (Devuyst, 2011).

Within this context, the EU has been negotiating with third countries to conclude new generation trade agreements and regulate the related trade relations²⁰. Cooperation agreements of a commercial and development nature according to ex Article 209 TFEU which need a broader legal basis²¹. Much more

¹⁸Proposal for a Regulation of the European Parliament and the Council on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council, COM/2021/579 final: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:579:FIN>

¹⁹See art. 207, par. 1 TFEU.

²⁰Communication from the Commission to the Council, the Parliament, the European Economic and Social Committee and the Committee of the Regions, Global Europe: Competing in the world. A contribution to the EU's growth and jobs strategy, COM(2006) 567, October 4, 2006: <https://eur-lex.europa.eu/EN/legal-content/summary/global-europe-competing-in-the-world.html>

²¹Comprehensive and enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, OJ L 23, 26.1.2018, p. 4-466 based on the legal bases of articles 207 and 209 TFEU, as well as art. 37 TEU relating to the sector of the Common Foreign and Security Policy and of articles 91 and 100, par. 2, TFEU, relating to the transport sector (Decision (EU) 2017/104 of the Council of 20 November 2017).

interesting are the agreements of the first two categories (Dionysiou, 2021; Sunner, 2021; Bungenberg, Reinisch, 2022)²² which have to do with the TSD Chapters and ensure a discussion that regulates sustainable development in the previous practice (Duràn, Morghera, 2012).

The parties thus trying to identify mutual obligations with the aim of balancing economic interests and socio-environmental needs where the TSD Chapters include sustainable development to a regulatory system that establishes a free trade regime as well as includes the protection of socio-environmental values (Reid, 2015) stating:

“(...) to pursue coherent and effectively mutually supportive trade and environmental policies (...) (Adinolfi, 2020).

Sustainable development finds its basis in the preamble of the new generation of preferential agreements as compared in the general principles with the parties²³, which appear as objectives to be pursued in a parallel way to the development of

²²See the EU-Canada Comprehensive Economic and Trade Agreement (CETA, OJ EU of 14.01. 2017, L 11); the EU-Japan Economic Partnership Agreement (EPA, OJ EU of 27.12.2018, L 330); the EU-Singapore Free Trade Agreement (OJ EU of 11.21.2019, L 294); the EU-Vietnam Free Trade Agreement (OJ EU of 12.06.2020, L 186); the EU-Andean Countries Trade Agreement (Colombia and Peru, OJ EU of 21.12.2021, L 354), modified by the Accession Protocol of Ecuador (OJ EU of 24.12.2016, L 356). For the Association Agreements see: the EU-Georgia Association Agreement (OJ EU of 08.30.2014, L 261); the EU-Moldova Association Agreement (OJ EU of 08.30.2014, L 260); the EU-Central America Association Agreement (OJ EU of 12.15.2012, L 346); the EU-Ukraine Association Agreement (OJ EU of 29.05.2011, L 161); the EU-UK Association Agreement (OJ EU of 04.30.2021, L 149).

²³EU-Georgia, op. cit., art. 2, par. 2; EU-Moldova, op. cit., art. 2, par. 2; EU-Ukraine, op. cit., art. 3.

international trade²⁴ and/or as a principle of the agreement²⁵. Sustainable development is thus based on a dimension that has a social, economic and environmental nature.

The TSD Chapters include the preliminary provisions and define the related objectives where the parties consider the promotion of sustainable development in trade relations of a bilateral nature²⁶.

The global agenda on sustainable development recalls the principles and related instruments that we have noted in international matters (the Kyoto Protocol and the UN 2030 Agenda), that is sustainable development²⁷, as provisions that offer a general reference framework useful for interpretative objectives that respect the commitments and sanction the subsequent sections (Duràn, 2020). Such provisions as the TSD Chapters strengthen cooperation and commercial relations with a view to promoting sustainable development and exclude the harmonization proposed by environmental legislation and workers' rights²⁸.

²⁴EU-Korea, op. cit., art. 1.1., par. 2, lett. g); EU-Andean Countries, op. cit., art. 4, lett. j).

²⁵EU-Central America, op. cit., art. 1, par. 2.

²⁶EU-Korea, op. cit., art. 13.1, par. 1; EU-Andean Countries, op. cit., art. 267, par. 1; EU-Singapore, op. cit., art. 12.1, par. 1; CETA, op. cit., art. 22.1, par. 1; EU-Georgia, op. cit., art. 227; EU-Moldova, op. cit., art. 363; EU-Ukraine, op. cit., art. 289.

²⁷EU-Vietnam, op. cit., art. 13.1, par. 2; EU-Japan, op. cit., art. 16.1, par. 1; EU-United Kingdom, op. cit., art. 397, par. 1.

²⁸EU-Korea, op. cit., art. 13.1, par. 3; EU-Singapore, op. cit., art. 12.1, par. 4; EU-Japan, op. cit., art. 16.1, par. 2; EU-United Kingdom, op. cit., art. 355, par. 4.

As regards the following section, it devotes itself to the substantive provisions and identifies three groups of rules which impose various kinds of obligations on the parties. Such rules for ratifying and implementing the main multilateral conventions on the environment and on labor concern the prohibition of weakening the national levels of protection by establishing the respective internal regulations as more ambitious objectives where the parties undertake to protect their own legal system.

In the first phase of regulations we see the clauses of the minimum level of protection that bind the parties to ratify and implement their own internal regulations as well as the main international conventions relating to sustainable development. Social protection respects the fundamental rights and principles that go back to the International Labor Organization (ILO).

In the Declaration on Fundamental Principles and Rights at Work of 1998²⁹, it is affirmed:

“(...) freedom of association and the right to bargain collective; the elimination of all forms of forced labour; the effective abolition of child labor

Exceptions are the association agreements with Georgia, Moldova and Ukraine, which provide for the obligation for these states to implement certain European directives on environmental matters into their legal systems (see, inter alia, EU-Moldova, op. cit., articles 91 and 97).

²⁹See in particular: Forced Labor Convention (No. 29); Convention on Freedom of Association and Protection of the Right to Organize (No. 87); Right to Organize and Collective Bargaining Convention (No. 98); Equal Remuneration Convention (No. 100); Abolition of Forced Labor Convention (No. 105); Convention on Discrimination (Employment and Occupation, No. 111); Minimum Age Convention (No. 138); Worst Forms of Child Labor Convention (No. 182).

and; the elimination of discrimination in matters of employment and profession”.

The parties make all possible efforts to ratify the fundamental conventions of the ILO to which they have not yet acceded (Alston, 2004; Agustí-Panareda, Ebert, Leclercq, 2015) (Alston, 2004; Agustí-Panareda, Ebert, Leclercq, 2015)³⁰.

On the other hand, for environmental policy, the parties undertake to effectively guarantee internal legislation, multilateral agreements and the reference to international agreements³¹ reaching as far as the Paris Agreement on climate change³². Provisions that are limited to the reference and normative obligations that are pre-existing on the level of international law, without defining other normative standards. These clauses are also noted in the dispute between Union and South Korea (Nissen, 2022)³³ where the Union clarified that Korea is responsible as “having violated the rule which requires respect for workers' freedom of association (Article 13.4, paragraph 3, first subparagraph, letter a, EU-Korea

³⁰EU-Korea, op. cit., art. 13.4, par. 3; CETA, op. cit., art. 23.3, par. 4; EU-Japan, op. cit., art. 16.3, par. 3. EU-Georgia, op. cit., art. 229, par. 4; EU-Moldova, op. cit., art. 365, par. 4; EU-Singapore, op. cit., art. 12.3, par. 4; EU-Ukraine, op. cit., art. 291, par. 3).

³¹An exception is the EU-Andean Countries agreement, op. cit. (Article 270, par. 2).

³²EU-Japan, op. cit., art. 16.4, par. 4; EU-Singapore, op. cit., art. 12.6, par. 3; EU-Vietnam, op. cit., art. 13.6, par. 1.

³³<https://www.iisd.org/itn/en/2021/10/07/the-trade-related-conundrum-of-the-eu-korea-fta-expert-panel-are-ftas-a-novel-forum-to-enforce-sustainable-development-goals/>

Agreement)³⁴, on the other hand, has not ratified all the fundamental conventions of the ILO. The panel of experts established pursuant to Article 13.15 of the related trade agreement, found incompatibility profiles between some internal provisions of the Korean legal system and the provision of the trade agreement which imposes respect for the freedom of association of workers.

It invites the parties to work assiduously to ratify the fundamental ILO conventions to which they are not parties (Article 13.4, paragraph 3, second subparagraph, EU-Korea). The panel recognized its legally binding character.

The aforementioned provision imposes a middle obligation, the parties are required to make all the necessary efforts to ratify the conventions, without the non-ratification being automatically configured as a violation of the agreement, since the latter does not set a specific deadline within which ratifications should take place.

Korea as has not yet ratified some fundamental conventions “does not in itself serve as evidence of its failure to comply with the EU-Korea FTA” (Murray, 2021).

We note a fairly weak legal value in front of rules that impose a best effort obligation but without a constraint for the parties to ratify international conventions within a certain period of time (Van T' Wout, 2022).

³⁴Trade Union and Labour Relations Adjustment Act (TULRAA).

On the other hand, maintaining the level of protection or the non-regression clause constitutes a limit to the right that is recognized to the parties by autonomously establishing the levels of internal protection in the environmental and social sectors³⁵.

The non-regression clause also includes the ban on adopting levels of environmental and social protection that are lower than the respective regulations in order to obtain the commercial advantage³⁶. Thus the parties are not authorized to derogate from, avoid and give effect to the legislative provisions on the environment and work with the effect of altering the commercial conditions.

The environmental and social standards where the parties align at national level are not defined in the agreements:

“(...) the only prohibition is to lower and to fail to enforce them in order to gain an unfair competitive trade advantage (or to attract foreign investments)” (Adinolfi, 2020).

In promoting sustainable development, the limitation of these clauses is that they require a direct link with commercial dynamics. In order for the violation of these rules to be found, it is necessary that the weakening of national provisions has produced effects at a commercial level, affecting trade or

³⁵EU-Korea, op. cit., art. 13.3; CETA, op. cit., art. 23.2. and 24.3; EU-Ukraine, op. cit., art. 290; EU-Vietnam, op. cit., art. 13.2, par. 1.

³⁶EU-Korea, op. cit., art. 13.7; EU-Japan, op. cit., art. 16.2, par. 2; EU-Andean Countries, op. cit., art. 277, par. 1-2; EU-Georgia, op. cit., art. 235.

investments (Van Oostrum, 2021)³⁷.

It is difficult to understand when the non-regression clause has actually been violated, as it would be necessary to verify the existence of a causal link between the lowering of the levels of socio-environmental protection and the change in commercial conditions.

It is clear that the purpose of these rules is simply to guarantee uniform and equal conditions in the commercial sphere, avoiding that less restrictive measures in terms of environmental protection and workers' rights favor one party to the detriment of the other (Duràn, 2020).

Thus it is understood that the minimum level and non-regression clauses represent two measures that in reality read together given that this is the suggestion and the minimum standard that the parties must respect by aligning themselves with the obligations that are bound according to the principles of international law is established.

The internal levels of socio-environmental protection are regulated in a discreet way and cannot be placed below the threshold and any consequences on trade. Regarding the non-regression clause, the discipline also adds other restrictive measures that are compatible with international obligations and

³⁷In particular see: Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (Text with EEA relevance), PE/20/2020/INIT, OJ L 198, 22.6.2020, p. 13-43.

are admissible on trade and investments (Bronckers, Gruni, 2021).

Another obligation is stated in the level of protection clause, as protection where each party is required to work with its own policies and legislative provisions that provide for and encourage levels of internal protection in the environmental and social sectors³⁸. The terms of a duty are formulated where the rules place obligations of means and results, i.e. the best efforts clauses which impose a proactive behavior without establishing in a precise way the results and obligations to be achieved³⁹.

Obligations that having to do with sustainable development include trade agreements, which have a diversified character, aiming at ensuring competitive conditions thus preventing the recourse to deregulatory measures dealing with the environment and labor and obtaining a competitive advantage that is seen through the regression clause.

In a more organic way in the socio-environmental sector, the implications of a commercial nature are noted by setting a minimum threshold of compliance within the internal discipline, i.e. the minimum level clause which promotes national standards, in other words the high level clause.

³⁸ EU-Central America, op. cit., art. 285, par. 2; EU-Korea, op. cit., art. 13.3; EU-Moldova, op. cit., art. 364, para. 2; CETA, op. cit., articles 23.2 and 24.; EU-Singapore, op. cit., art. 12.2, par. 2.

³⁹ EU-Central America, op. cit., art. 285; CETA, op. cit., articles 23.2 and 24.3; EU-Korea, op. cit., art. 13.3; EU-Japan, op. cit., art. 16.2, par. 1; EU-Georgia, op. cit., art. 228, par. 2; EU-Vietnam, op. cit., art. 13.2, par. 2.

Strength and legal objectives of such clauses allow for substantial limitations that weaken the regulatory road (Gammage, 2018; Harrison, Barbu, Campling, Richardson, Smith, 2019). Within this perspective the provisions are interpreted in the political objectives as legal commitments (Vandenberghe, 2008) therefore they were not followed during the expert panel between EU and South Korea, as it was clarified that the provisions on sustainable development have a promotional nature according to the effects of binding legal force (Murray, 2021).

Dispute Resolution Mechanisms. Practice, criticism, final goals and, future solutions

The binding nature of the TSD Chapters rules does not leave space for further discussions given the effectiveness of the provisions to promote sustainable development through the applicable dispute resolution mechanisms (Marx, Ebert, Hachez, Wouters, 2017; Liakopoulos, 2020). All commercial agreements concluded as well as the TSD Chapters are removed from the sphere of effectiveness of the dispute mechanism of a general nature⁴⁰.

⁴⁰EU-Korea, op. cit., art. 1.16; EU-Central America, op. cit., art. 284, par. 4; CETA, op. cit., articles 23.11, par. 1 and 24.16, par. 1; EU-Vietnam, op. cit., art. 13.16, par. 1; EU-Georgia, op. cit., art. 242, para. 1.

As regards the ordinary procedure, bilateral consultations are unsuccessful, therefore, an arbitration board can produce a final report which is binding on the parties⁴¹. The respondent party fails to execute within a reasonable time when the appellant party proceeds to a claim for compensation or suspension of obligations arising from the agreement.

Such a mechanism allows for the adoption of measures of a coercive nature which require the cessation of an unlawful conduct. In the case of conflicts that have to do with the application of the rules and in the TSD Chapters, the parties take into consideration ad hoc resolution procedures that are based exclusively on cooperation and political dialogue without setting up enforcement mechanisms. This type of procedure is inspired by a conciliatory logic which is based on the political will of the states and the related obligations envisaged.

The EU is based on a series of measures and initiatives that seek to oversee the implementation of the pre-established obligations that arise from potential disputes⁴². This logic of cooperation teaches mutual transparency, exchange of information and the sharing of experiences in national practice. The monitoring of the implementation of the TSD Chapters is in the responsibility

⁴¹EU-Korea, op. cit., chapter 14; CETA, op. cit., chapter 29; EU-Moldova, op. cit., chapter 14.

⁴²EU-Central America, op. cit., art. 294-295; EU-Korea, op. cit., art. 12.13-13.13; EU-Georgia, op. cit., art. 239-214; EU-Japan, op. cit., art. 16.12-16.16.

of the Committee for Trade and Sustainable Development, an intergovernmental committee which is composed of functions of an administrative nature, that represent an authorized forum for opinions to the contracting parties. The resolution of disputes verify a conflict concerning the application of the provisions on sustainable development where the parties try to resolve the dispute through governmental consultations and consultancies that are offered by international organizations that compete in environmental and labor matters. If the result is not positive, each party can refer the matter to a group of experts which produces a report with the relative recommendations which are addressed as defaulters to the measures to be taken to resolve the relative dispute⁴³.

This is a procedure that follows the subsequent phase, i.e. related to the implementation of the final report where the agreements establish the measures that are suggested by the panel of experts and which remain within the discretion of the states. The parties are required to follow up on the conclusions they provide to the expert group to discuss the relevant measures to be implemented with a generic way and of taking any steps that the parties have the political will to follow and resolve the dispute⁴⁴.

⁴³EU-Korea, op. cit., art. 13.14-13.15; EU-Georgia, op. cit., art. 242-243; CETA, op. cit., articles 23.9-23.10 and 24.14-24.15; EU-Vietnam, op. cit., art. 13.16-13.17.

⁴⁴EU-Georgia, op. cit., art. 243, para. 8. EU-Japan, op. cit., art. 16.8, par. 6; EU-Singapore, op. cit., art. 12.17, par. 9; EU-Vietnam, op. cit., art. 13.17, par. 9; EU-

From what we understand is that the parties are so activated to take the relevant measures when there is no obligation to comply with the recommendations that are prescribed by the panel. The publication of the report by the group of experts has as a result the launch of a new phase of dialogue between the parties thus stating:

“(...) an obligation to negotiate (...) in good faith and with the purpose of identifying a measure or an action plan suitable to put an end to the unlawful conduct”.

This, however, does not define the content of the actions or measures that the parties should take, nor does it require that such initiatives must align with the conclusions of the panel. The final settlement of the dispute does not necessarily have to coincide (nor be consistent) with the recommendations prepared by the group of experts. The implementation of the measures undertaken by the defaulting party is monitored by the Committee for Trade and Sustainable Development, whose governmental composition cannot guarantee impartiality of judgment (Adinolfi, 2020).

The respondent party persists in unlawful behavior where there is no complaint and no coercive compliance measures are taken.

Central America, op. cit., art. 301, par. 3; CETA, op. cit., art. 23.10, par. 12 and 24.15, par. 11. “(...) the parties shall make every effort to take into account the opinions or recommendations of the group of experts on the implementation of this chapter (...)” (art. 13.15, paragraph 2). In the agreement with the Andean countries: “(...) the part of the procedure concerned informs the subcommittee on trade and sustainable development about its intentions regarding the recommendations of the expert group, also by presenting an action plan for the implementation of these recommendations (...)” (art. 285, par. 4).

This procedure better demonstrates and characterizes the conciliatory nature of a model that proposes a dialogue to the EU on the involvement of third parties, thus excluding the recourse to measures of a sanctioning nature and in the event of violation the related obligations. It is a more incisive system, devoid of the relative tools that are capable of ensuring the maintenance of the socio-environmental standard principles that are set by the relative agreements.

Such a resolution mechanism has also been seen in the dispute between the EU and South Korea based on the Chapters on sustainable development offered by trade agreements (Sun Han, 2021; Nissen, 2022; Boisson de Chazournes, Lee, 2022). Especially, South Korea:

“(...) has taken steps to adapt to the recommendations provided by the panel of experts, modifying some aspects of the internal legislation deemed to be in contrast with the freedom of association of workers, as well as ratifying three of the four fundamental pending conventions of the ILO (...)”⁴⁵.

We can understand that the Korean dispute does not support a model proposed by the Union which has as functional nature a commitment oriented towards workers' rights and to strong popular pressure (García, 2022). The decisive role of states is played when their political interests guarantee the

⁴⁵On April 20, 2021, Korea proceeded to ratify the Convention on Forced and Compulsory Labor (C29), the Convention on Freedom to Organize and the Protection of the Right to Organize (C87) and the Convention on the Right to Organize and Collective Bargaining (C98). The Convention on the Abolition of Forced Labor (C105) remains to be ratified. The updated list of ILO Conventions ratified by Korea can be consulted on the Organization's website.

implementation of environmental and social standards within a prospective and imaginary dimension of regulatory instruments towards the promotion of effective sustainable development to a widespread model of trade agreements which is insufficient and improvable.

The question is the resolution of the dispute and the prevention of a more current and dynamic enforcement mechanism (Van Den Putte, Orbie, 2015). A greater involvement of the company in supervising compliance with the obligations and authorizing, filing a complaint to follow the institutional procedures available (Bronckers, Gruni, 2021).

It is a road that is also based on the TSD Chapters as an additional element that is useful in the monitoring phase and without a constraint from the resolution procedures. Coercive measures in the event of violation of the rules that are established by both parties take the form of financial or commercial sanctions (Bronckers, Gruni, 2021).

The subject is broad and there are many critical issues given that the sanctions deteriorate and minimize the risks of possible violations without however invoking their implementation, thus believing that the sanctions are counterproductive due to the negative impact on trade, such as an economic damage caused, which aggravates the inability to guarantee compliance with socio-environmental standards in the case of involvement of

developing countries (Marx, Ebert, Hachez, 2017; Prèvest, Alexovičová, 2019; Duràn, 2020).

Since 2017, the EC has already taken a position regarding the effectiveness of the model adopted, stating that:

“(...) anticipated by the publication of a non-paper in which two possible alternatives were proposed for revising the rules on sustainable development in trade agreements (...)”⁴⁶,

invoked the consolidation of the cooperative approach through a more “assertive” attitude, strengthening the dialogue and monitoring tools, as well as providing for more precise complaint mechanisms based on a more rigid approach according to the model followed by the USA and Canada (Araujo, 2018).

It concerned the introduction of binding dispute resolution procedures, admitting the possibility

“(...) to apply sanctions in case of non-compliance impacting trade or investment between the parties (...)”.

The sanctions could qualify as commercial (withdrawal of concessions granted) or pecuniary (fines), and would be adopted in the event of non-compliance with the decisions taken by the arbitration panel in the course of a dispute (Araujo, 2018).

Continuing in 2018 with a second paper, the EC tried to develop its position where it believed and stated that:

⁴⁶European Commission, Non-paper of the Commission Services Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs), Non-paper of the Commission services, 22.06.2022: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3921

“(...) the model involving the use of sanctions was not supported by a widespread consensus” (Leal-Arcas, 2019)⁴⁷.

The debate conducted confirmed the belief that the implementation of Trade and Sustainable Development (TSD) chapters should be stepped-up and improved. The possible provision of sanctions, on the one hand, would not guarantee the effective, sustainable and lasting improvement of key social and environmental standards on the ground, on the other, would not fit easily with the EU's model (Leal-Arcas, 2019).

It is understood that the absence of sanctions is not a sufficient system to ensure compliance with the agreed socio-environmental standards. Therefore, it should be noted that the imposition of sanctions distorts the collaborative approach of the Union thus providing the TSD Chapters with an additional tool that in the event of non-compliance with the decisions of the panel of experts and the other enforcement mechanisms fail, they remain in place.

Coercive measures of a direct nature incentivize the fulfillment of obligations which is not extraneous to the action of the Union within the framework of commercial policy. And with regard to the GSP as it is regulated through the Regulation (EU) n. 978/2012, provides for three distinct regimes:

⁴⁷European Commission, Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements, Non paper of the Commission services, 26.02.2018, p. 3.

“(…) one general and two special: here, the first of the special regimes is particularly important, i.e. that of incentives for sustainable development and good governance, known as GSP+(…)”⁴⁸.

Based on a positive and negative conditionality mechanism, it provides for the granting of additional tariff preferences to the benefit of developing countries deemed vulnerable, provided that they ratify and effectively implement certain international conventions on the environment, good governance, human rights and workers' rights, including the core ILO conventions⁴⁹. In the event that it finds the violation of the obligations established in the regulation, the Commission can temporarily revoke the tariff concessions granted⁵⁰.

Also in this case the coercive spirit is noticeable in the extent to which the revocation induces the countries that are beneficiaries of the trade preferences to respect the envisaged commitments.

⁴⁸Regulation (EU) no. 978/2012 of the European Parliament and of the Council of 25 October 2012 relating to the application of a system of generalized tariff preferences, in OJ EU of 31.10.2012, L 303/1: “(…) to all developing countries which share a common need in terms of development and which are at a similar stage of economic development (recital n. 9). The other special regime (chapter IV, articles 17-18), on the other hand, is aimed at less developed countries, and provides for duty-free access to the Union market for products originating from these countries, with the exception of the arms trade (…).”

⁴⁹Regulation (EU) no. 978/2012, op. cit., art. 9. See also: Part A of Annex VIII to the Regulation.

⁵⁰Pursuant to art. 15 of the regulation, the GSP+ regime is temporarily revoked if the beneficiary country does not comply with the obligations established by art. 9, par. 1, lit. d), e), and f) (concerning, respectively: the ratification and implementation of the envisaged conventions; the reporting and monitoring obligations imposed by the conventions to which it is a party; participation in the control procedure pursuant to art. 13 of the regulation), or formulate a reservation prohibited by the pertinent conventions or incompatible with their object and purpose pursuant to art. 9, par. 1, lit. c).

In this case the revocation is the result of a unilateral initiative by the EC where the consequence of a decision taken by a panel of experts or by an arbitration board has ascertained the violation committed⁵¹.

The use of this type of clause by of the Union is very rare and even null given the existing provisions on sustainable development. The fact that the possibility of adopting restrictive measures within the GSP framework is already an essential element demonstrates how the Union does not exclude measures within the regulatory provisions on sustainable development⁵².

The adoption of measures provided for in the GSP is admitted within the same commercial agreements context to a general dispute settlement procedure based on disputes external to the TSD Chapters. When the defaulting party fails to comply with the recommendations of the arbitration panel, the appellant party

⁵¹Based on art. 15 of Regulation 978/2012: “(...) offers the beneficiary country every opportunity to collaborate (par. 5) (...) all the information it deems necessary, including the conclusions and recommendations of the competent control bodies (...)” (par. 6).

⁵²Implementing Regulation (EU) No 143/2010 of the Council of 15 February 2010 temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided for under Regulation (EC) No 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka, OJ L 45, 20.2.2010, p. 1-2. Commission Delegated Regulation (EU) 2017/836 of 11 January 2017 amending Annex III to Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences, C/2016/8996, OJ L 125, 18.5.2017, p. 1-2. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The power of trade partnerships: working together for a green and just economic growth, COM(2022) 409, 22.06.2022, p. 13.

may request compensation that temporarily suspends the obligations deriving from the agreement.

The cooperation of the Union does not represent the protection of commercial interests and is entrusted to more precise and rigid mechanisms to an enforcement that excludes the rules on sustainable development. The restrictive measures in a tout court manner and the commercial policy included in an ad hoc context of the commercial agreements asks the Union to reject the TSD Chapters. Thus we share the supposition that the intransigence of the Union motivates the assessments of a political nature and it is hypothesized that the Union itself as well as its commercial partners contest a lack of respect for socio-environmental standards within the Member States.

What are the procedures for trade disputes and sanctions that are unitary in nature?

So far we have seen and noticed that the EC has followed a traditional path of using effective tools that aim to strengthen TSD Chapters. According to the Communication entitled: “The Power of Business Partnerships: Together for just and green economic growth”, which was adopted in June 2022, the EC:

“(...) made the proposal to “further align the application of the chapter on trade and sustainable development to the general mechanism for the settlement of disputes between states and to extend the phase of compliance with disputes referred to in this chapter (...) a significant opening, never seen

before and, therefore, destined to have an impact on future trade negotiations (...)⁵³.

Unifying dispute resolution procedures would, first of all, limit the risks of internal overlapping between distinct procedures. The existence of multiple resolution mechanisms, in fact, can generate uncertainty about the most appropriate procedure to activate in reference to a specific dispute. This can happen in circumstances in which, due to the peculiarity of the disputed conduct, a dispute could fall under several sections of the agreement, with the consequence that different procedures would be potentially applicable⁵⁴.

Due to the dispute between the EU and Ukraine of 2019 regarding the new generation trade agreements and the related panel of experts based on Article 306 of the related association agreement (Dolle, Medina, 2020), the restrictive measures on the export of timber products has accessed an unprecedented dispute. In practice Ukraine considered:

“(...) that the issue fell within the scope of the chapter on trade and sustainable development (Chapter 13), while the Union had requested the establishment of the panel by resorting to the general resolution mechanism (Chapter 14). The difference, obviously, is substantial, since in the second case the contentious procedure of a binding nature is applied, while in the TSD Chapters the consultative procedure illustrated in the previous paragraph is relevant. Without going into the merits of the matter, the episode

⁵³After the consultative phase (art. 305 of the agreement) had not produced results, on 20 June 2019 the EU started the litigation phase, requesting the establishment of the arbitration panel. On the affair, known as the Ukraine wood export ban.

⁵⁴Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The power of trade partnerships: together for green and just economic growth, COM/2022/409 final, par. 4.

referred to shows how the existence of multiple resolution procedures risks generating confusion in identifying the “competent court pursuant to the agreement, among the various contemplated and potentially conflicting courts (...)” (Dolle, Medina, 2020).

The attempt to standardize the resolution procedures has the objective of calming the disputes concerning the rules on trade and sustainable development to the general dispute mechanism as it is characterized by the binding nature of the decision envisaged by the arbitration panel and as a consequence of the adoption of sanctions in case of non-compliance.

Within this context, the EC stated that:

“(...) the possibility of imposing trade sanctions as a measure of extrema ratio”, the implementation of which would follow “the general dispute resolution rules⁵⁵ (...) limited only to cases” of serious infringements of the fundamental commitments” included in the TSD Chapters, such as the “fundamental principles and rights in the work of the ILO and the Paris Agreement on climate change (...)”⁵⁶.

Positions that were also based on the negotiations between the Union and the trade agreement with New Zealand from June 2022. The negotiations ended with relative enthusiasm as the European Commissioner for Trade Valdis Dombrovskis stated that:

“(...) such agreement would contain the most ambitious sustainability commitments in any trade agreement ever (...)”⁵⁷.

⁵⁵Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The power of trade partnerships: together for green and just economic growth, COM/2022/409 final, par. 5.

⁵⁶Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The power of trade partnerships: together for green and just economic growth, COM/2022/409 final, par. 6.

⁵⁷EU-New Zealand Trade Agreement: Unlocking sustainable economic growth, Press release, 30 June 2022:

The text of the agreement was based on EU which previously established the unitary discipline regarding the settlement of disputes⁵⁸ sanctioning the adoption of trade sanctions of serious violations of fundamental labor rights or the Paris Agreement when a party is compliant and followed by the panel of experts and/or does so with measures incompatible with the content of the decision⁵⁹.

Following this reasoning, we also noticed another unification that can be seen from the Paris Agreement⁶⁰, which prevented the sanctions that can adopt violations of the agreements, thus creating a specific appeal. The absence of concrete clarifications in the commercial agreement will be left to the panel of experts where the identification of the acts or omissive behaviors can give rise to a breach of the Agreement of Paris (Bodansky, 2016; Van Calster, Reims, 2021; Mayer, 2023), as an assessment that does not seem easy, considering the content as vague as regards the obligations of this agreement as well as the adoption of sanctions which is not admitted to violations concerning environmental obligations which are incumbent between the EU and the New Zealand according to the trade

https://ec.europa.eu/commission/presscorner/detail/en/IP_22_4158

⁵⁸EU-New Zealand, op. cit., Chapter 26.

⁵⁹EU-New Zealand, op. cit., Chapter 26. art. X.16, par. 1.

⁶⁰EU-New Zealand, op. cit., Chapter 26. art. X.16, par. 1, lett. a).

agreement⁶¹.

This is a significant paradigm shift in the EU approach to the enforcement of TSD chapters. However, critical issues remain which, ultimately, risk weakening the entire discipline, as confirmed by the space, in fact residual, provided for the adoption of sanctions (Ceretelli, 2022).

Sustainable development had emerged under the Trade and Cooperation Agreement with the United Kingdom (Weiss, 2021; Peers, 2022) especially in the area of environmental policy (Gehring, 2021). As regards the provisions relating to social and environmental protection, which are contained in title XI⁶² entitled: “Equal conditions for open and fair competition and for sustainable development” (Leonelli, 2021), suggest a specific objectivity oriented towards the promotional pursuit, i.e. an integral part of the economic conditions in favor of the parties that have mutually granted each other (Leonelli, 2021).

The United Kingdom has made European legislation not in a precise and binding way for the country but has independently established the levels of internal protection in the socio-environmental field. The United Kingdom has weakened its regulatory standards having to do with environmental and social

⁶¹See art. X.5, par. 2: “(...) effectively implement the multilateral environmental agreements (MEAs), protocols and amendments that it has ratified and which have entered into force (...)”.

⁶²In particular see: Chapter 1 (General Provisions), Chapter 6 (Social and Labor Standards), Chapter 7 (Environment and Climate) and Chapter 8 (Other Instruments for Trade and Sustainable Development).

protection ending up having a competitive advantage over the Union where competitive conditions are a prospect even if the extent of trade between the Union and the United Kingdom is not desirable. The non-regression clause also in this case was provided for by the former Article 391 of the agreement where the wording reproduces past preferential trade agreements⁶³.

The resolution of disputes is oriented towards a conciliatory approach⁶⁴. The dispute has as its object the obligations of non-regression when the group of experts as created by Article 409 states that the violation of the defendant party does not comply with the recommendations and the party can advance the request for compensations that are temporary to suspend the obligations deriving from the agreement⁶⁵.

This type of measure is presented as an economic protection of the ambitious objectives in the socio-environmental sector⁶⁶. The agreement of the United Kingdom in a virtuous manner and in the field of climate change represents a commercial agreement

⁶³See: Article 387, par. 2 and art. 391, para. 2.

⁶⁴See: Part Six, Title I, art. 389, par. 2, “(...) in favor of an ad hoc mechanism, of a conciliatory type, governed by articles 408-411 (...)”.

⁶⁵EU-United Kingdom, op. cit., art. 410, par. 2-3, which provides: “(...) for the application, mutatis mutandis, of articles 749 and 750, which provide for the adoption of “temporary corrective measures” in the execution phase of the arbitration award (...)”.

⁶⁶“(...) rebalancing measures” pursuant to art. 411 that the parties can adopt if, between them, there are “large differences” in the sectors of social protection and environmental or climate protection likely to “significantly affect trade or investment” (par. 2). How does the par. 2, the aforementioned measures must have “scope and duration limited to what is strictly necessary and proportionate to remedy the situation”, preferring “measures that cause the least possible disturbance in the functioning of this agreement (...)”.

that has been concluded with the Union, a qualified agreement, which fights against climate change, respect for democracy, the rule of law and human rights and, the fight against the proliferation of weapons of mass destruction⁶⁷.

Especially, according to Article 772 the related clause between the parties, and in the case of serious and substantial breach of the essential elements of Article 771, allows the right to denounce or suspend the functioning of the agreement (Dörr, Schmalenbach, 2018; Channg-Tung, Garcia, 2019; Hollis, 2020; Fitzmaurice, Merkouris, 2020)⁶⁸ finding a serious and substantial non-compliance as expected from the Paris Agreement and as established by Article 772, para. 4 verifying an art or omission likely to “substantially frustrate the object and purpose” of the aforementioned agreement.

The inclusion of clauses on “essential elements” in agreements concluded with third countries is a consolidated practice of the Union. These clauses have always had as their object the respect for democratic principles and human rights (Bartels, 2005; Hachez, 2015; Moberg, 2015; Martines, 2016; Wouters, Ovàdek, 2021).

In conclusion, the agreement with the United Kingdom is certainly a definitive and positive novelty, which can be evaluated for the fight against climate change which strengthens

⁶⁷EU-United Kingdom, op. cit., art. 771.

⁶⁸Art. 60, par. 3, lett. c) of the Vienna Convention on the Law of Treaties.

the Agreement of Paris by certifying the relevance between the parties not so much on a legal level but on a political one in the matter of climate change. The identification of acts or omissions classifiable as serious and substantial breaches are necessary in order not to forget that the Union is still committed to activating clauses of this type, provoking relations between the parties from a legal and political point of view (Del Biondo, 2011; Meissner, Mckenzie, 2019).

Concluding Remarks

From what we have tried to analyze so far, we have understood that sustainable development in the context of the EU is linked to trade agreements, i.e. to the trade policy of the EU. Obviously, this policy has not also included the development of regulatory instruments that have to do with social and environmental protection, as we have also seen with the obligations established in the TSD Chapters and in the binding dispute resolution procedures.

In TSD Chapters they do not place obligations on the parties for results, i.e. obligations that have to do with the high level of protection, but obligations contemplated according to the regulatory provisions that do not appear to have an ambitious nature because they aspire and align themselves with the existing standards of international law or the minimum

protection clause aspiring to protect interests according to socio-environmental needs and non-regression clauses. In the latter case, the advisory nature of the procedure does not ensure the fulfillment of the established obligations.

The EU has certainly made progress but there is no shortage of changes and modifications given the unprecedented and encouraging scenarios. We have noticed a certain sensitivity of the EC which seems causal and the result of solitary proposals. Positions that are consistent with political programs that pursue and privilege sustainable development as a priority objective of the action where the level is both internal and external. The forecast in the sector of commercial agreements and negotiation that we have mentioned in the previous paragraphs show enforcement tools that are certainly more precise and incisive. The initiatives in the field of social and environmental protection pave the way for the European Green Deal where the sustainable development is considered and stabilized as “the cornerstone of European action for a new growth strategy”.

A viable road moving forward towards the Next Generation EU (NGEU) which has a broad environmental nature⁶⁹, as well as the proposed regulation on the related carbon border adjustment

⁶⁹Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, p. 17-75: “(...) in order to have access to the funding of the facility, at least 37% of the measures prepared in the National Recovery and Resilience Plans must have the ecological transition as their purpose (Article 18, paragraph 4, letter e) and respect, in any case, the Do Not Significant Harm (DNSH) principle, i.e. not cause damage significant to the environment (Article 5, paragraph 2).

mechanism⁷⁰ and the directive on the duty of business due diligence on environment and human rights⁷¹. Broader news are included in trade agreements with New Zealand and the United Kingdom, as milestones for the foreseeable future. A future full of ambitious changes and institutional proposals within the EU and above all in the commercial and environmental sector.

Although the agreement with New Zealand is not definitive, the text undergoes even marginal changes thus expressing the value of registration that New Zealand is a commercial partner not at the forefront of the European exhibition which exerts intense pressure during the negotiations. On the other hand, the United Kingdom during the negotiations and afterwards is aware of a precise agreement which makes it unique and hardly repetitive with another state (Shuibhne, 2021; Eckes, Leino-Sandberg, 2022).

We have to be careful. The evolution of commercial and environmental policy is now a witness where the will on the side of the Union places the promotion of sustainable development on a concrete commercial agenda that strengthens the enforcement tools that form part of free trade agreements. The

⁷⁰European Commission, Proposal for a regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism, COM(2021) 564, 14.07.2021: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52021PC0564>

⁷¹European Commission, Proposal for a Directive of the European Parliament and of the Council on corporate due diligence for sustainability and amending Directive (EU) 2019/1937, COM(2022), 23.02.2022: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>

spirit of dynamism in the environmental sector has been considered as a conditional type that exercises the Union even in the embryonic stage towards a more stable policy in the economic and political sector (Fierro, 2003; Leino, 2005). Negotiations continue decisively. The agreements will certainly continue by tracing an ambitious and definitive road to follow in the related policies for future generations and for the improvement of human life to a healthy environment.

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